Michigan Arbitration and Mediation Case Law Update
Alternative Dispute Resolution Section
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INTRODUCTION

This update reviews Michigan appellate decisions issued since September 2022 concerning arbitration and mediation. For the sake of brevity, this update uses a short citation style rather than the official style for Court of Appeals (COA) unpublished decisions.

The video of the author's 2021-2022 update presentation is at:

www.youtube.com/watch?v=kZpATRmGCcQ

The video of the author's 2020-2021 update presentation is at:

https://www.youtube.com/watch?v=9Q7deVlExDI

The video of the author's 2019-2020 update presentation is at:

https://www.youtube.com/watch?v=I0TkP8zs-A8

ARBITRATION

Michigan Supreme Court Decisions

Supreme Court reverses COA concerning shortened limitations period.

McMillon v City of Kalamazoo, ___ Mich ___, 983 NW2d 79, MSC 162680, COA 351645 (Jan 11, 2023). Plaintiff applied for job with City of Kalamazoo in 2004. She completed application and underwent testing and background check, but she did not get job. In 2005, City contacted her about a job as Public Safety Officer, and she was hired. She did not fill out another application in 2005. In 2019, Plaintiff sued City, alleging discrimination and harassment in violation of Elliott-Larsen CRA and Persons with Disabilities CRA. City moved for summary disposition, relying, in part, on provision in application Plaintiff had signed in 2004 that had nine-month limitations period. Circuit Court granted City's motion for summary disposition. COA affirmed in unpublished opinion. Supreme Court ordered oral argument on application to address whether: (1) *Timko v Oakwood Custom Coating, Inc*, 244 Mich App 234 (2001), correctly held limitations clauses in employment applications are part of binding employment contract; (2) Appellant is bound by terms of document that states "this … is not a contract of employment," *Heurtebise v Reliable Business Computers, Inc*, 452 Mich 405 (1996); (3) contractual

limitations clauses that restrict civil rights claims violate public policy, *Rodriguez v Raymours Furniture Co, Inc*, 225 NJ 343 (2016); and (4) these issues are preserved. *Mich Gun Owners, Inc v Ann Arbor Pub Schs*, 502 Mich 695, 708-709 (2018).

On Jan 11, 2023, after hearing oral argument on application for leave, Supreme Court reversed that part of COA judgment affirming summary disposition for defendant based on shortened nine months limitations period in application, vacated remainder of COA judgment, and remanded case to Circuit Court for further proceedings. Circuit Court and COA had held lawsuit barred by nine month limitation period. Supreme Court held there is genuine issue of material fact whether plaintiff had notice of use of prior application materials' future employment-related terms and whether she agreed to be bound by those materials. **City had not sufficiently demonstrated that parties had mutuality of agreement to be entitled to summary disposition.** Without mutuality of agreement, there can be no contract. Justice Welch, concurring, would have ruled on whether *Timko* correctly held limitations clauses in employment applications are part of binding employment contract.

https://www.courts.michigan.gov/48e075/siteassets/case-documents/uploads/sct/public/orders/162680_59_01.pdf

https://www.courts.michigan.gov/courts/supreme-court/case-information-2022-2023-term/2022-october-case-information/162680-lakisha-mcmillon-v-city-of-kalamazoo/

Supreme Court orders oral argument on COA, utilizing *Detroit Auto Inter-Ins Exch v Gavin*, 416 Mich 407 (1982), standard, affirming vacatur of labor arbitration award.

Mich AFSCME Council 25 v Wayne Co, 356320 and 356322 (April 21, 2022), **app lv pdg, oral argument to be scheduled**. In split decision, COA affirmed Circuit Court vacatur of labor arbitration award. On verge of discharge, employee took cash-in retirement. Employee applied for retirement while awaiting outcome of disciplinary action initiated by employer. His retirement application required him to agree to "separation waiver." The "waiver" stated he was terminating his employment and not seeking reemployment. Defendant terminated his employment following day. Employee allowed his retirement application to proceed, but he also filed grievance pursuant to CBA with employer, seeking reinstatement of employment. In meantime, County Retirement System approved employee's retirement. Employee thereafter transferred his defined contribution retirement account funds to an IRA. Arbitrator reinstated employee in spite of retirement issues. Circuit Court and COA vacated award in light of retirement issues. **Vigorous oral argument before COA**.

Judge Jansen dissent stated that because arbitrator did not exceed its authority in issuing award, Circuit Court should have confirmed award. Applicability of defenses to arbitration, including waiver, is for arbitrator to decide. Only two issues before arbitrator where (1) whether employee was terminated for just cause, and (2), if not, whether remedy limited to back pay rather than reinstatement. Separation waiver was raised

before arbitrator as defense, but not as total bar to reinstatement. Arbitrator properly treated it as affirmative defense. Employer's argument that award was illegal or violated public policy because of possible tax code violations irrelevant.

Top link is two judge decision. Middle link is dissent. Bottom link is oral argument.

https://www.courts.michigan.gov/498579/siteassets/case-documents/uploads/opinions/final/coa/20220421_c356320_57_356320.opn.pdf

https://www.courts.michigan.gov/498579/siteassets/case-documents/uploads/opinions/final/coa/20220421_c356320_58_356320d.opn.pdf

https://www.courts.michigan.gov/496f07/siteassets/case-documents/uploads/coa/public/audiofiles/audio_356320_04122022_102538.mp3

On Sep 28, 2022, Supreme Court ordered oral argument on application be scheduled. Parties will address: (1) **whether standard in *Detroit Auto Inter-Ins Exch v Gavin*, 416 Mich 407 (1982), applies to labor arbitration cases**, see *Bay City Sch Dist v Bay City Ed Ass'n, Inc*, 425 Mich 426, 440 n 20 (1986), and *Port Huron Area Sch Dist v Port Huron Ed Ass'n*, 426 Mich 143, 150 (1986); and (2) whether Circuit Court erred in vacating arbitrator's awards.

https://www.courts.michigan.gov/courts/supreme-court/cases-awaiting-argument/164435-6-mi-afscme-council-25-v-wayne-county/

As background, ***Mich Family Resources, Inc v SEIU***, 475 F3d 746 (6th Cir 2007)(en banc), discussed standard for reviewing labor arbitration awards. In *Mich*, Union appealed District Court vacating award. Sixth Circuit reversed because arbitrator acting within scope of authority, company had not accused arbitrator with fraud or dishonesty, arbitrator was arguably construing CBA, and company had shown no more than arbitrator made error in interpreting CBA. *Mich* said following should be looked at in deciding whether to vacate labor arbitration award. Did arbitrator act outside authority by resolving dispute not committed to arbitration? Did arbitrator commit fraud, have conflict of interest or act dishonestly in issuing award? In resolving legal or factual disputes, was arbitrator arguably construing or applying CBA? As long as arbitrator does not offend any of these requirements, request for judicial intervention should be denied even though arbitrator made serious, improvident, or silly errors. Arbitrator exceeds authority only when CBA does not commit dispute to arbitration.

Mich AFSCME Council 25 discussed at Hornberger, "*Michigan AFSCME Council 25 v Wayne County* - A Saga of *Steelworkers* Trilogy, *Michigan Family*, and *Gavin*," *Oakland County Legal News* (January 31, 2023).

https://www.legalnews.com/oakland/1519761

Supreme Court orders oral argument on COA reversing Circuit Court order denying arbitration.

Saidizand v GoJet Airlines, LLC, 355063 (Sep 23, 2021), **app lv pdg, oral argument to be scheduled.** Plaintiff brought claims against employer and a supervisor under Elliot-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq*, alleging he was harassed and discriminated against because of his ethnic background and religion. Defendants requested summary disposition, citing an arbitration agreement signed by plaintiff when he completed application for his position. Agreement stated he and GoJet agreed to resolve all claims arising out of application, employment, or termination exclusively by arbitration. Circuit Court denied defendants' motion for summary disposition as to plaintiff's ELCRA claims. Court of Appeals reversed holding Circuit Court erred by determining whether ELCRA claims were subject to arbitration because under terms of agreement plaintiff and GoJet agreed that arbitrator had authority to determine whether plaintiff's claims subject to arbitration. On June 23, 2023, Supreme Court ordered oral argument on application to address **whether discrimination claims under ELCRA may be subjected to mandatory arbitration as condition of employment under Michigan law**. Cf *Rembert v Ryan's Family Steak Houses, Inc*, 235 Mich App 118 (1999), with *Heurtebise v Reliable Business Computers*, 452 Mich 405 (1996).

https://www.courts.michigan.gov/49ef23/siteassets/case-documents/uploads/opinions/final/coa/20210923_c355063_45_355063.opn.pdf

https://www.courts.michigan.gov/49ef24/siteassets/case-documents/uploads/sct/public/orders/163664_52_01.pdf

https://www.courts.michigan.gov/courts/supreme-court/cases-awaiting-argument/163664-yaser-saidizand-v-gojet-airlines,-llc/

Michigan Court of Appeals Published Decisions

COA reverses Circuit Court order not to arbitrate with Board members.

Steward v Sch Dist of the City of Flint, ___ Mich App ___, 361112 and 361120 (May 11, 2023). Plaintiff was hired by defendants to serve as Superintendent of schools for City of Flint. She worked under written employment agreement that had broad arbitration clause for resolution of disputes. Signatories to contract were Plaintiff and "Board of Education of the School District of the City of Flint." Plaintiff clashed with several members of Board, including defendants (Board members). Plaintiff complained Board members created hostile work environment. Dispute resulted in plaintiff's removal. After plaintiff filed suit against Board members, they moved for summary disposition based on arbitration provision. Circuit Court granted relief to all of entity defendants, but not Board members because they were not parties to agreement that contained arbitration provision. COA reversed denial of summary disposition because

obligation to arbitrate disputes extended to Board members as well as School District. COA ruled Circuit Court erred in denying Board members ability to demand arbitration under employment agreement between Plaintiff and District. *Altobelli v Hartmann*, 499 Mich 284, 294-295; 884 NW2d 537 (2016).

https://www.courts.michigan.gov/499df7/siteassets/case-documents/uploads/opinions/final/coa/20230511_c361112_33_361112.opn.pdf

Gilbride and Cobane, "Extending Arbitration Agreements to Bind Non-signatories," *Michigan Bar Journal* (February 2019).

http://www.michbar.org/file/barjournal/article/documents/pdf4article3592.pdf?_gl=1*n4rdur*_ga*MTUyMDE4NjA3OC4xNjA0NjE0ODY2*_ga_JVJ5HJZB9V*MTY5MTQ5MjQyOC45NjEuMS4xNjkxNDkzODM1LjAuMC4w

Circuit Court should stay case instead of dismissal when it orders arbitration.

Legacy Custom Builders, Inc v Rogers, ___ Mich App ___, 359213 (Feb 9, 2023). Plaintiff appealed Circuit Court order compelling arbitration. COA held Circuit Court correctly enforced agreement to arbitrate, but **should have stayed proceedings pending arbitration instead of dismissing case**. Burden on party seeking to avoid agreement, not party seeking to enforce agreement. MUAA, MCL 691.1681 *et seq*., and Michigan Court Rules required Circuit Court to stay lawsuit pending arbitration. MCL 691.1687; MCR 3.602(C).

https://www.courts.michigan.gov/490bc6/siteassets/case-documents/uploads/opinions/final/coa/20230209_c359213_45_359213.opn.pdf

Michigan Court of Appeals Unpublished Decisions

COA reverses MERC concerning definition of "teacher."

Kalamazoo Public Schools v Kalamazoo Education Association, 363573 (August 10, 2023). Issue was whether MCL 423.215(3)(j) of Public Employment Relations Act (PERA), MCL 423.201 *et seq*, prohibits arbitration of parties' disagreement. Michigan Employment Relations Commission (MERC) agreed with Union that demand for arbitration was not prohibited by PERA. In split decision, COA disagreed and reversed MERC's order dismissing unfair labor practice charge against Employer. Employer argued word "teacher" in MCL 423.215(3)(j) of PERA is defined by MCL 38.71(1) of TTA or MCL 380.1249(8) of Revised School Code (RSC), MCL 380.1 *et seq*, or both, and MERC erred by disregarding both of these statutory definitions in favor of dictionary definitions of the word "teacher." Union argued that MERC correctly adopted dictionary definitions. COA agreed with Employer that TTA definition of "teacher" is controlling.

Judge Yates dissent stated COA should accept MERC ruling that employee, as a

guidance counselor, was not “teacher” for purposes of placement under MCL 423.215(3)(j).

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https://www.courts.michigan.gov/4a2a7d/siteassets/case-documents/uploads/opinions/final/coa/20230810_c363573_28_363573d.opn.pdf

COA affirms Circuit Court order denying arbitration in dentist non-compete case.

Paine v Godzina, 363530 (July 27, 2023). **What does “and” mean?** Appellants argued Circuit Court erred because plain language of contractual agreement required arbitration of parties’ dispute regarding non-compete clause. Based on word “and” in arbitration agreement, COA affirmed Circuit Court’s denial of motion to compel arbitration. COA agreed with Circuit Court that language, “[a]ny dispute, controversy or claim between the Associate and the Employer concerning questions of fact arising under this Agreement and concerning issues related to wrongful termination … shall be submitted … to the American Arbitration Association,” means arbitration is required for cases that involve both questions of fact arising under Agreement and issues related to wrongful termination.

https://www.courts.michigan.gov/4a1e21/siteassets/case-documents/uploads/opinions/final/coa/20230727_c363530_27_363530.opn.pdf

COA affirms Circuit Court confirmation of labor arbitration award.

AFSCME Council 25 Local 1690 v Wayne County Airport Authority, 360818 (June 29, 2023). Union requested vacatur of award. Award denied wage increase relief where one provision of CBA provided for a wage increase and the arbitrator authority provision of CBA specifically said arbitrator could not grant any wage increase. Circuit Court denied vacatur. COA affirmed. COA said:

> The plain and unambiguous language of Article 10.04, Step 4(E) prohibits the arbitrator from granting a wage increase, without exception, and grants him the authority to interpret and apply the terms of the CBA, which he did. Because the arbitrator’s award was a valid exercise of his authority and “drew its essence” from the contract, it cannot be disturbed. … If the parties wish to create an exception that would allow a future arbitrator to enforce Article 34.07’s remedy, then they may bargain for additional language to be added to that extent. Neither we, nor the arbitrator, can modify the terms of the contract to grant plaintiff relief.

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COA affirms Circuit Court dismissal because of arbitration clause.

Zora v AM & LN, 360224 (June 29, 2023) **app lv pdg**. COA affirmed Circuit Court ruling that Zora's lawsuit barred by arbitration agreement. Zora argued that *Lichon v Morse*, 507 Mich 424; 968 NW2d 461 (2021), resulted in material change in law of arbitration that affected Circuit Court's ruling. Zora asserted *Lichon* held that expansive interpretation of an arbitration agreement, which is how Circuit Court construed arbitration clause, only applies in context of collective bargaining agreements. COA held *Lichon* does not undermine or conflict ruling. *Lichon* ruled that while parties are bound to arbitration if disputed issue is "arguably" within an arbitration clause in the context of collective bargaining agreements, the principle does not apply outside that context, in which case arbitration agreements are to simply be read like any other contract. The COA ruling is not predicated parties' dispute merely being "arguably" within arbitration clause.

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COA affirms Circuit Court entry of JOD based on DRAA arbitration.

Weaver v Weaver, 361752 (June 15, 2023). Defendant wife argued Circuit Court erred by entering JOD which reflected arbitration award that failed to value and divide marital portion of plaintiff's 401(k) plan without first holding hearing to ensure 401(k) was divided appropriately because arbitrator exceeded its powers in failing to value and divide it. Defendant further argued Circuit Court erred in entering JOD based on award that was incomplete and failed to equitably divide marital property, awarded plaintiff non-marital property (that should have been considered marital), and made defendant responsible for her entire student loan debt. Defendant contended remand necessary for evidentiary hearing to ensure that all marital assets are appropriately identified, valued, and divided equitably. COA affirmed Circuit Court. COA reviews de novo Circuit Court decision to confirm an award. *Washington v Washington*, 283 Mich App 667, 671; 770 NW2d 908 (2009). "A reviewing court may not review the arbitrator's findings of fact, and any error of law must be discernable on the face of the award itself." *Id*. at 672. "[I]n order to vacate an arbitration award, any error of law must be so substantial that, but for the error, the award would have been substantially different." *Id*. at 672. Whether an arbitrator exceeded its authority is also reviewed de novo.

https://www.courts.michigan.gov/49f1a4/siteassets/case-documents/uploads/opinions/final/coa/20230615_c361752_35_361752.opn.pdf

COA affirms Circuit Court confirmation of award.

Leczel v Intrust Bldg, Inc, 362855 (June 15, 2023), app lv pdg. COA affirmed confirmation of award in case arising from home construction and apportionment of liquidated damages issue.

https://www.courts.michigan.gov/49d5dd/siteassets/case-documents/uploads/opinions/final/coa/20230615_c362855_30_362855.opn.pdf

COA reverses Circuit Court vacatur of award.

Certainty Construction, LLC v Davis, 361276 (May 25, 2023). In this contract dispute, the Circuit Court vacated award of attorney fees and determination that construction lien was valid. Because there was nothing on face of award that demonstrated error of law, COA held Circuit Court erred by vacating attorney fees award.

https://www.courts.michigan.gov/49bbef/siteassets/case-documents/uploads/opinions/final/coa/20230525_c361276_51_361276.opn.pdf

COA affirms Circuit Court ordering arbitration.

UAW v 55th Circuit Court, 361366 (May 11, 2023). Employer argued Union did not properly or timely request arbitration under CBA, and matter was therefore withdrawn and no longer arbitrable. Employer argued that CBA provides threshold issue of whether Union's request for arbitration was timely submitted for Circuit Court, rather than arbitrator, to decide. Circuit Court and COA held that threshold issues of whether Union timely invoked arbitration under CBA to be decided by arbitrator.

https://www.courts.michigan.gov/499ded/siteassets/case-documents/uploads/opinions/final/coa/20230511_c361366_52_361366.opn.pdf

COA affirms Circuit Court confirmation of remanded clarified award.

Soulliere v Berger, 359671 (April 27, 2023), **app lv pdg**. COA affirmed Circuit Court denying defendants' motion to vacate award and instead confirming arbitrator's award as clarified by arbitrator pursuant to COA's previous remand.

https://www.courts.michigan.gov/498fb5/siteassets/case-documents/uploads/opinions/final/coa/20230427_c359671_30_359671.opn.pdf

COA reverses Circuit Court order not to arbitrate.

Payne-Charley v Team Wellness Ctr, Inc, 361380 (April 13, 2023). Employer appealed Circuit Court holding employment agreement did not require parties to arbitrate dispute. According to Employer, parties required to resolve dispute in arbitration under plain terms of employment agreement. COA agreed and reversed.

https://www.courts.michigan.gov/497bf4/siteassets/case-documents/uploads/opinions/final/coa/20230413_c361380_57_361380.opn.pdf

COA affirms Circuit Court on arbitration waiver issue.

Renu Right, Inc v Shango, 359976 (March 23, 2023). Shango argued he did not have knowledge of his right to arbitration and Circuit Court erred in concluding he waived his right to arbitration. COA disagreed and affirmed Circuit Court not ordering arbitration. Shango claimed he did not read agreement and could not have waived his right to arbitration because he allegedly had no knowledge of arbitration clause.

https://www.courts.michigan.gov/4957bb/siteassets/case-documents/uploads/opinions/final/coa/20230323_c359976_41_359976.opn.pdf

COA affirms confirmation of employment arbitration award.

Waller v Blue Cross Blue Shield of Mich, 360392 (March 23, 2023). Michigan Uniform Arbitration Act, not court rule, applies because MCL 691.1683(1) states MUAA governs all agreements to arbitrate made after July 1, 2013, and MCR 3.602(A) confines court rules to all other forms of arbitration that are not governed by UAA. MUAA does not contemplate arbitration must be closed before party may move to vacate or modify award from that arbitration. MCL 691.1703(1) provides Circuit Court may vacate "an award" from arbitration proceeding without requiring award be final and definite award. Plaintiff's contention party may only challenge final and definite award to Circuit Court is without support. Award regarding attorney fees and costs did not modify economic and noneconomic damages that were already awarded.

https://www.courts.michigan.gov/4957a4/siteassets/case-documents/uploads/opinions/final/coa/20230323_c360392_43_360392.opn.pdf

COA affirms order to arbitrate.

Barada v American Premium Lubricants, LLC, 359625 (March 23, 2023). Plaintiffs moved to strike defendants' "affirmative defense" of arbitration, arguing defendants waived their right to arbitration because they were participating in the litigation. Defendants filed witness lists, participated in depositions, and stipulated to add parties as codefendants after having asserted their "affirmative defense" to arbitration. Circuit Court held arbitration clause plainly stated arbitration was exclusive remedy to disputes under contract and that there was no carve out for injunctive relief. Plaintiffs appealed. COA affirmed.

https://www.courts.michigan.gov/4957ce/siteassets/case-documents/uploads/opinions/final/coa/20230323_c359625_41_359625.opn.pdf

COA partially affirms Circuit Court concerning ordering arbitration.

Vascular Management Services of Novi, LLC v EMG Partners, LLC, 360368 (March 9, 2023). Plaintiffs appealed order compelling plaintiffs and defendants to participate in binding arbitration. COA affirmed but remand to Circuit Court for further proceedings regarding arbitrability.

https://www.courts.michigan.gov/493ba1/siteassets/case-documents/uploads/opinions/final/coa/20230309_c360368_57_360368.opn.pdf

COA affirms Circuit Court confirming award.

Yaffa v Williams, 360732 (March 2, 2023). Williamses purchased home from Yaffa. In seller's disclosure statement, Yaffa represented septic tank and drain field in working order. Later inspection report noted home had public sewer system, but it also indicated bathroom drainage system was not adequately functioning. Inspector suggested further investigation needed. No further inspection occurred. Parties agreed to addendum to purchase agreement, which required Yaffa to provide additional $2,000 toward closing costs. After Williamses took possession of home, they discovered septic system not operational. Matter submitted to arbitration. Arbitrator found Yaffa fraudulently misrepresented septic system was in working order when he sold home. Arbitrator awarded Williamses exemplary damages and costs. Circuit Court confirmed award. COA affirmed confirmation. COA stated:

> Although this Court reviews de novo a trial court's decision to enforce an arbitration award, our review is "extremely limited." *Fette v Peters Const Co*, 310 Mich App 535, 541; 871 NW2d 877 (2015). "A reviewing court may not review the arbitrator's findings of fact, and any error of law must be discernible on the face of the award itself." *Washington v Washington*, 283 Mich App 667, 672; 770 NW2d 908 (2009) … . Thus, "only a legal error that is evident without scrutiny of intermediate mental indicia will suffice to overturn an arbitration award." *Id*. (quotation marks and citation omitted). This Court will not review "the arbitrator's mental path leading to the award." *Id*. (quotation marks, citation, and alteration omitted). "[A]ny error of law must be so substantial that, but for the error, the award would have been substantially different." *Id*. (quotation marks and citation omitted). Because "courts may not substitute their judgment for that of the arbitrators," any claims of legal error "must be carefully evaluated in order to assure that [they are] not used as a ruse to induce the court to review the merits of the arbitrator's decision." *Id*. at 675 … .

https://www.courts.michigan.gov/492cca/siteassets/case-documents/uploads/opinions/final/coa/20230302_c360732_34_360732.opn.pdf

COA affirms Circuit Court confirming award.

Clancy v Entertainment Managers, LLC, 357990 (February 2, 2023), **app lv pdg**. Advance for wedding reception case. AAA administered arbitration under expedited proceedings pursuant to its Commercial Arbitration Rules. According to COA, defendant did not explain how it was prejudiced by use of expedited procedures such that award would have been "substantially otherwise" had arbitration been conducted differently. Contrary to defendant's assertion, arbitrator did not disallow official recording of arbitration hearing or prevent defendant from arranging stenographic recording of proceeding. Concerning attorney fees, plaintiffs' contention that arbitration provision allowed award of reasonable attorney fees for "[a]ll claims and disputes arising under or relating to [the] Agreement" within plain language of provision. COA affirmed Circuit Court confirmation of award.

https://www.courts.michigan.gov/48fd58/siteassets/case-documents/uploads/opinions/final/coa/20230202_c357990_51_357990.opn.pdf

COA affirms Circuit Court confirming arbitration award.

Domestic Uniform Rental v Bronson's, 359297 (Jan 19, 2023). Case arose from rental agreement between parties for delivery of supplies. Defendants appealed order confirming award. COA affirmed. According to Circuit Court and COA, arbitrator did not make errors of law by enforcing contract terms. COA agreed with appellant that award reflected an error of law concerning attorney fee award, but **Circuit Court did not err by confirming award because appellants cannot demonstrate that substantially different award would have been rendered but for the error**. As long as arbitrator is even arguably construing or applying contract and acting within scope of authority, court may not overturn award even if convinced arbitrator committed serious error. *Ann Arbor v AFSCME*, 284 Mich App 126 (2009).

https://www.courts.michigan.gov/48f0b4/siteassets/case-documents/uploads/opinions/final/coa/20230119_c359297_39_359297.opn.pdf

COA holds court case stayed rather than dismissed when case sent to arbitration.

SP v Lakelands Golf and Country Club, 359710 (Jan 12, 2023). COA affirmed Circuit Court determination hostile work environment allegations of complaint subject to arbitration. COA affirmed Circuit Court decision to stay proceedings pending arbitration. To extent Circuit Court may have dismissed, rather than stayed, any of plaintiff's claims that were sent to arbitration, it erred by doing so, and those claims are reinstated and stayed. COA held individual defendant entitled to enforce arbitration agreement despite not being signatory to agreement and question of arbitrability of plaintiff's claims

question for court. See ***Legacy Custom Builders, Inc v Rogers***, ___ Mich App ___, 359213 (Feb 9, 2023).

https://www.courts.michigan.gov/48e2d2/siteassets/case-documents/uploads/opinions/final/coa/20230112_c359710_39_359710.opn.pdf

COA affirms Circuit Court denying motion to compel arbitration.

Schmidt v Bowden, 360454 (Jan 5, 2023). After parties closed on sale of property, plaintiff commenced arbitration proceedings regarding sales commission with Board of Realtors. Defendant argued plaintiff was not entitled to commission and commission dispute not subject to arbitration. Circuit Court denied motion to compel arbitration. COA affirmed. Plaintiffs conceded parties did not contract to arbitrate commission issue. Plaintiffs presented no written agreement regarding commission, with or without an arbitration clause. There was no arbitration clause for the court to review. Plaintiffs argued that even though parties did not agree to arbitrate, they are compelled to arbitrate because both plaintiff and defendant, as real estate professionals, voluntarily belonged to real estate organizations that required arbitration of disputes. Plaintiffs assert that defendant belonged to North Oakland County Board of Realtors and plaintiff belonged to Ann Arbor Board of Realtors, both of which have rules containing mandatory arbitration provisions. Plaintiffs asserted that Michigan 2021 Code of Ethics and Arbitration Manual applicable to real estate professionals, as well as MLS where defendant listed her home, also compel arbitration. Plaintiffs theorized that because parties are members of real estate associations, rules of those associations impute to parties agreement to arbitrate a disputed commission. Plaintiffs did not support this theory with Michigan authority.

https://www.courts.michigan.gov/48dc08/siteassets/case-documents/uploads/opinions/final/coa/20230105_c360454_31_360454.opn.pdf

COA rules court, not arbitrator, to decide validity of arbitration agreement.

Domestic Uniform Rental v Custom Ecology of Ohio, Inc, 358591 (Dec 22, 2022). Reversing Circuit Court, COA held court, not arbitrator, must decide validity of arbitration agreement. Party cannot be required to arbitrate issue which it has not agreed to submit to arbitration. Existence of arbitration agreement and enforceability of its terms are questions for court, not arbitrator. MCL 691.1686(2).

https://www.courts.michigan.gov/4b02a7/siteassets/case-documents/uploads/opinions/final/coa/20221222_c358591_32_358591.opn.pdf

Review of DRAA award.

Lam v Do, 354174 (Nov 22, 2022). Following binding domestic relations arbitration, Do was displeased with results. He cited errors in arbitrator's calculation of Lam's income for child support purposes and sought credit in property division for supporting Lam in her postdoctoral work. Arbitrator rejected these points and a final divorce decree entered. COA affirmed in part, but remanded for recalculation of child support based on Lam's previous three years of income pursuant to 2017 Michigan Child Support Formula (MCSF) 2.02(B).

https://www.courts.michigan.gov/4b0373/siteassets/case-documents/uploads/opinions/final/coa/20221122_c354174_67_354174.opn.pdf

COA affirms confirmation of award.

Clark v Suburban Mobility Auth for Reg Trans, 359204 (Nov 10, 2022). In matters involving arbitration, it is purview of arbitrator to decide substantive issues between parties and court's role is limited. Whether dispute is subject to arbitration is for court to determine. MCL 691.1686(2). Award for PIP benefits not basis for reversal of Circuit Court's order.

https://www.courts.michigan.gov/4b01cc/siteassets/case-documents/uploads/opinions/final/coa/20221110_c359204_34_359204.opn.pdf

COA affirms dismissal of action to vacate award.

Wolf Creek Production, Inc v Gruber, 358559 (Sep 29, 2022), lv den ___ Mich ___ (2023). COA affirmed Circuit Court *sua sponte* dismissal of complaint to vacate award because plaintiff failed to file timely motion to vacate. MCR 3.602.

https://www.courts.michigan.gov/4a817d/siteassets/case-documents/uploads/opinions/final/coa/20220929_c358559_30_358559.opn.pdf

MEDIATION

Michigan Supreme Court Decisions

Supreme Court reversed COA concerning oral agreement.

Rieman v Rieman, ___ Mich ___; 985 NW2d 828, MSC 164081, COA 352197 (March 10, 2023). In lieu of granting leave to appeal, **Supreme Court reversed that part of COA judgment which found that plaintiff's claims barred by statute of frauds**. Alleged **oral agreement** purports only to address profits from sale proceeds

generated from real estate transactions, as opposed to creating or transferring interest in real estate itself. Case remanded for consideration of whether question of fact exists as to whether parties had a post-sale oral agreement. Justices Viviano and Zahra dissented and would have denied leave to appeal, agreeing with COA that statute of frauds barred plaintiff's claim that his oral agreement - and not parties' duly executed written document - reflected true nature of parties' agreement.

https://www.courts.michigan.gov/493d4c/siteassets/case-documents/uploads/sct/public/orders/164081_95_01.pdf

https://www.courts.michigan.gov/493ce8/siteassets/case-documents/uploads/opinions/final/coa/20211118_c352197_83_352197.opn.pdf

Supreme Court orders oral argument on COA affirming Circuit Court that no settlement agreement.

Citizens Ins Co of Am v Livingston Co Rd Comm'n, ___ Mich App ___, 356294 (Sep 15, 2022), **app lv pdg, oral argument to be scheduled.** COA held local government can be bound by settlement agreement entered into by its attorney if (1) government later ratifies agreement or (2) attorney had prior special authority to settle claim. Attorney may bind client to agreement if lawyer had "some precedent special authority" to enter into such settlement on behalf of client, even if client is governmental unit. If ongoing discovery related to whether Commission's attorney had authority from Commission to settle case on its behalf, then, notwithstanding there was no public meeting ratifying agreement, Commission would be bound by settlement agreement. Mediation. Subsequent email negotiations. Attorney-client privilege issue.

https://www.courts.michigan.gov/4a67f4/siteassets/case-documents/uploads/opinions/final/coa/20220915_c356294_55_356294.opn.pdf

On March 31, 2023, Supreme Court ordered oral argument on application. Parties shall file briefs addressing: (1) whether material question of fact exists regarding whether parties entered into binding settlement agreement; (2) **whether material question of fact exists regarding whether defendant's former attorney had authority to approve settlement agreement**; and (3) whether defendant waived attorney-client privilege as to documents related to its former attorney's authority to settle.

https://www.courts.michigan.gov/courts/supreme-court/cases-awaiting-argument/164951-citizens-ins-co-v-livingston-cnty-rd-commn/

Michigan Court of Appeals Published Decisions

COA affirms Circuit Court modification of consent JOD.

Brendel v Morris, ___ Mich App ___, 359226 (Jan 12, 2023). Courts permitted to modify child support orders when changed circumstances demand, even if child support award negotiated as part of consent JOD. Parties agreed to one-time lump-sum child support payment in consent JOD. Before payment could be made, recipient stopped exercising most of his parenting time. This change of circumstances warranted review of child support award. Circuit Court agreed with this principle but cited other grounds for granting the relief requested. COA affirmed. Transfer requirement clearly was a child support award, and consent JOD provided for equal parenting time of alternating weeks. **Attorney fee issue. *Brendel*** discussed at Gorbein and DiMichelle, "The Case of the Issue," *Michigan Family Law Journal* (June/July 2023), p. 11.

https://www.courts.michigan.gov/48e2f2/siteassets/case-documents/uploads/opinions/final/coa/20230112_c359226_33_359226.opn.pdf

Michigan Court of Appeals Unpublished Decisions

COA reverses Circuit Court that there was a settlement agreement.

Deep Harbor Condominium Ass'n v Marine Adventure, LLC, 360185 (July 13, 2023). Attorneys exchanged emails about potential settlement. Whether emails resulted in enforceable settlement agreement was issue before COA. G moved to enforce settlement agreement, claiming emails represented settlement enforceable under MCR 2.507(G), terms of which included global release of all claims by all parties. Other parties opposed motion, contending emails represented mere negotiations and not enforceable settlement agreement. Circuit Court granted motion to enforce agreement, concluding emails constituted enforceable agreement. Circuit Court reasoned settlement was proposed by G and accepted by other attorneys on behalf of their clients. Circuit Court did not enter settlement agreement because parties had not agreed to specific terms to include in those documents. Circuit Court ordered parties submit proposed settlement documents and Circuit Court would hold a hearing "to determine the specific terms and details of the sale, appropriate releases, and closing dates." Appellants contended emails did not evince meeting of minds on all essential terms and instead represented mere negotiations among parties. COA agreed. No agreement was set forth on record in open court. Purported agreement set forth in email chain among attorneys. Emails can form contract in compliance with MCR 2.507(G), provided emails evince meeting of minds and emails are subscribed by party against whom agreement is offered or party's attorney. When email chain is purported to reflect settlement agreement, emails must contain indisputable proof that emails were final agreement of parties and terms on which parties settled. See ***Dabash v Gayar***, ___Mich App ___, 358727 (Sep 15, 2022).

https://www.courts.michigan.gov/4a014f/siteassets/case-documents/uploads/opinions/final/coa/20230713_c360185_62_360185.opn.pdf

COA affirms Circuit Court concerning settlement agreement.

In re Edmund Talawanda Trust, 360789, 360790 (June 29, 2023). After mediation, parties consented to mediator making proposal for resolution of remaining issues, and that proposal became settlement agreement. Appellants argued mediator lacked authority to make binding post-mediation ruling pertaining to interpretation of paragraph six. Prior to closing, parties emailed mediator inquiring as to who would be responsible for cost of replacing roof. Mediator provided a response. COA did not address whether mediator's interpretation of settlement agreement was binding because interpretation of agreement is subject to de novo review, and COA agreed with mediator's interpretation.

https://www.courts.michigan.gov/49eebe/siteassets/case-documents/uploads/opinions/final/coa/20230629_c360789_41_360789.opn.pdf

COA affirms Circuit Court enforcement of settlement agreement.

In re Estate of Gjebic, 359760 (March 30, 2023). Decedent, Margaret, died. She was survived by two adult children, John and Joseph. John's wife appointed personal representative of Margaret's estate, and she filed petition to distribute remaining assets in estate to Margaret's heirs. John's wife and Joseph came to Settlement Agreement regarding distribution. Joseph never performed under SA. He contested SA's validity. Circuit Court enforced SA. COA affirmed. MCR 2.507(G) does not require parties, themselves, to sign SA and SA does not state it would be void without signatures of parties. Joseph's attorney subscribed to SA on the record, and she signed SA "w/ consent."

https://www.courts.michigan.gov/4999fb/siteassets/case-documents/uploads/opinions/final/coa/20230330_c359760_69_359760.opn.pdf

COA reverses Circuit Court not applying consent JOD.

Fox v Sims, 360165 (March 30, 2023). In divorce case, plaintiff appealed Circuit Court JOD. COA held Circuit Court abused discretion by failing to enter signed consent JOD as it was written, and instead altering its terms without a sufficient basis. Circuit Court did not err when it declined to award child support retroactively from time divorce action filed.

https://www.courts.michigan.gov/49665f/siteassets/case-documents/uploads/opinions/final/coa/20230330_c360165_36_360165.opn.pdf

COA affirms Circuit Court enforcement of settlement agreement.

International Union Security Police & Fire Professionals of Am v Maritas, 359846 (March 16, 2023). Circuit Court determined that lack of plaintiff's signature on 2013 agreement was not dispositive because 2013 stipulated order was signed by the attorneys and order referenced that parties had entered into settlement agreement. COA held reasonable to conclude stipulated order "logically associated with" settlement agreement and one's signature on order satisfies statute of frauds with respect to agreement.

https://www.courts.michigan.gov/49494f/siteassets/case-documents/uploads/opinions/final/coa/20230316_c359846_49_359846.opn.pdf

COA affirms enforcement of settlement agreement.

McNay v McNay, 361186 (March 2, 2023). Plaintiff and defendant married for 24 years before they started divorce action that resulted in mediation, arbitration, and consent JOD. "The following issues will be submitted to arbitration in lieu of a Court trial: Content and language disputes regarding the Judgment of Divorce[;] . . . [and a]ny issues inadvertently left unsolved by the attorneys and their clients at mediation." Arbitrator issued opinion regarding JOD. Defendant moved to modify section of JOD. Circuit Court denied defendant's motion. COA affirmed. Ambiguity surrounding how defendant was supposed to pay plaintiff for her interest in marital home was within arbitrator's authority because arbitrator had authority to resolve content and language of disputes in JOD, as well as other issues that had not yet been resolved.

https://www.courts.michigan.gov/492c97/siteassets/case-documents/uploads/opinions/final/coa/20230302_c361186_36_361186.opn.pdf

COA affirms Probate Court enforcement of MSA.

Estate of Terry Broemer, 360571 (Feb 9, 2023). S___, N___, and their counsel, as well as D___ and approximately 95 purported heirs represented by attorney C___, attended mediation. MSA reached at mediation and was signed by S___, individually and as mother and next friend of M___, by N___, and by their counsel, as well as by attorney C___ on behalf of purported heirs. Appellant did not appear at Zoom hearing regarding her objection to MSA. V___ presented argument on behalf of appellant under purported power of attorney. V___ did not address validity of will in her argument. She challenged appellant's share of estate. Probate Court found V___ engaging in unauthorized practice of law. Court also found objection untimely. Court found appellant had received notice of mediation, had been advised that she could opt in or could opt out, and had been advised mediation was binding on everyone, even if they chose not to participate. Probate Court entered order denying appellant's objection. COA affirmed. **MCR 5.120.**

https://www.courts.michigan.gov/490bbf/siteassets/case-documents/uploads/opinions/final/coa/20230209_c360571_42_360571.opn.pdf

COA affirms Circuit Court entry of JOD.

Keessen v Keessen, 359074 (Jan 26, 2023). Kim and Jay married in 2004. Marriage dissolved by JOD 2021. Kim appealed JOD, raising issues related to calculation of Jay's income, Circuit Court award of credits to Jay for payments allegedly made during a *status quo* period and division of receivership fees. COA affirmed JOD entry.

https://www.courts.michigan.gov/48ff99/siteassets/case-documents/uploads/opinions/final/coa/20230126_c359074_49_359074.opn.pdf

COA reviews attorney fee provision in settlement agreement.

Moore v Bush, 360555 (Jan 19, 2023). Plaintiff argued Circuit Court erred by not enforcing consent judgment's fee shifting provision for defendants' alleged noncompliance with terms of judgment entered after parties settled dispute regarding ownership to land. **COA reversed Circuit Court order denying attorney fees and remanded for further proceedings**. Under Michigan law, parties may contract for payment of attorney fees.

https://www.courts.michigan.gov/48f16d/siteassets/case-documents/uploads/opinions/final/coa/20230119_c360555_29_360555.opn.pdf

COA affirms Circuit Court enforcing settlement agreement.

Townsend v Esters, 358570 (Jan 19, 2023), lv den ___ Mich ___ (2023). Because plaintiff did not challenge validity of settlement agreement, agreement valid. By enacting settlement agreement, plaintiff voluntarily relinquished right to jury trial.

https://www.courts.michigan.gov/4904ce/siteassets/case-documents/uploads/opinions/final/coa/20230119_c358570_90_358570.opn.pdf

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Lee Hornberger is a former Chair of the Alternative Dispute Resolution Section of the State Bar of Michigan, Editor Emeritus of *The Michigan Dispute Resolution Journal*, former member of State Bar's Representative Assembly, former President of Grand Traverse-Leelanau-Antrim Bar Association, and former Chair of Traverse City Human Rights Commission. He is a member of Professional Resolution Experts of Michigan (PREMi), and a Diplomate Member of The National Academy of Distinguished Neutrals. He is a Fellow of the American Bar Foundation. He is also a Fellow of the Michigan State Bar Foundation.

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While serving with U.S. Army in Vietnam, he was awarded Bronze Star Medal and Army Commendation Medals. The unit he was in was awarded Meritorious Unit Commendation and Republic of Vietnam Gallantry Cross Unit Citation with Palm.

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